



Administrative Conference Draft Recommendation

Government in the Sunshine Act in the 21st Century

Committee on Regulation | April 22, 2014 Meeting Draft

In the late 1960s and 1970s, in the wake of increasing public vigilance concerning the activities of government sparked by the Vietnam War and Watergate, Congress passed and the President signed a series of transparency laws designed to promote greater accountability and transparency in government decisionmaking. The Government in the Sunshine Act, enacted in 1976, focused specifically on the transparency of meetings of multi-member agencies.¹ For any meeting involving a quorum of board or commission members, the agency must announce the event at least seven days in advance in the Federal Register and, with certain exceptions, permit attendance by interested members of the public.²

Notwithstanding its broad title, the Government in the Sunshine Act applies only to agencies that are headed by a group of board or commission members rather than an individual chairperson.³ In addition to the Act's enumerated exceptions,⁴ there are many ways of conducting business that fall outside its ambit. Specifically, any discussion among a group of agency members smaller than a quorum does not trigger the Act.⁵ The Act also does not apply

¹ Pub. L. No. 94-409, 90 Stat. 1241 (1976) (5 U.S.C. § 552b (2006)).

² 5 U.S.C. § 552b.

³ There are approximately 70 such agencies in the federal government. RICHARD K. BERG, STEPHEN H. KLITZMAN, & GARY J. EDLES, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 259–63 (2d ed. 2005); DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (1st ed., 2d printing 2013).

⁴ 5 U.S.C. § 552b(c).

⁵ See *id.* § 552b(a)(2) (defining “meeting” as any gathering featuring deliberations of “at least the number of individual agency members required to take action on behalf of the agency”); see also S. REP. NO. 94-354, at 19 (1975).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

when members communicate with one another and reach a decision via the exchange of written documents, a procedure known as “notational voting.”⁶

The research conducted for the project shows that some board and commission members dispose of a significant amount of business via means that are not subject to the Sunshine Act, relying especially heavily upon notational voting. For instance, of 32 agencies surveyed in connection with that research, 14 (approximately 40%) reported that they disposed of more than 75% of matters using that procedure, though the frequency with which it is used varies significantly from agency to agency.⁷ As a consequence, many government transparency advocates have argued that some agencies undermine the spirit of the Sunshine Act by relying excessively on methods of conducting business that fall outside of its scope.⁸ Many agencies, in turn, contend that they could not operate efficiently were they required to reach all substantive decisions in full agency meetings, especially those conducted in public.⁹

The Administrative Conference has addressed the Sunshine Act on two occasions, issuing recommendations designed to address concerns relating to the Act’s negative effects on collegial interactions among board and commission members, on the one hand, and to agencies’ overreliance upon means of conducting business that fall outside the Act’s scope, on the other. In 1984, the Conference recommended that “agency members be permitted some opportunity to discuss the broad outlines of agency policies and priorities . . . in closed meetings, when the discussions are preliminary in nature or pertain to matters . . . which are to be considered in a public forum prior to final action.”¹⁰ In 1995, a special committee convened

⁶ *Comm’n Sys., Inc. v. Fed. Comm’n Comm’n*, 595 F.2d 797, 798–99, 801 (D.C. Cir. 1978).

⁷ Reeve T. Bull, *The Government in the Sunshine Act in the 21st Century* 57 (Mar. 10, 2014) (citing to research conducted by Professor Bernard Bell), available at <http://www.acus.gov/sites/default/files/documents/Government%20in%20the%20Sunshine%20Act%20Draft%20Report%20CIRCULATED%203-10-14.pdf>.

⁸ *Id.* at 25.

⁹ *Id.* at 19–20.

¹⁰ Administrative Conference of the United States, Recommendation 84-3, ¶ 2, 49 Fed. Reg. 29,942 (July 25, 1984).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

by the Conference recommended that Congress establish a pilot program (lasting from five to seven years) that would allow members to meet privately so long as they provide a detailed summary of the meeting no later than 5 days after it has occurred.¹¹ In exchange, pilot program participants would agree to refrain from using notational voting on “important substantive matters,” instead addressing those issues in open meetings, and would “hold open public meetings, to the extent practicable, at regular intervals, at which it would be in order for members to address issues discussed in private sessions or items disposed of by notation.”¹²

~~Due to the closure of the Administrative Conference~~~~Because the Administrative Conference was defunded~~ shortly after the special committee issued its report, this recommendation was never forwarded to the full Assembly for consideration in Plenary Session.¹³

In the surveys conducted for this project, although agency officials express many of the same frustrations with the operation of the Sunshine Act that they voiced in the prior Administrative Conference studies,¹⁴ they indicated that they generally are able to conduct business under the existing regime.¹⁵ Though governmental transparency advocates would prefer that agencies render more of their decisionmaking in open meetings, curtailing or eliminating the use of notational voting in all circumstances would prove disruptive to agencies’

¹¹ Administrative Conference of the United States, *Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421, 427 (1997) (the meeting summary “would indicate the date, time, participants, [and] subject matters discussed, and [would contain] a review of the nature of the discussion”).

¹² *Id.* at 427–28.

¹³ A pilot program along the lines of the 1995 recommendation permitting one or more agencies to hold private meetings would provide empirical evidence concerning whether such a policy change would promote collegiality without undermining the Act’s overarching purpose of promoting transparency. Therefore, Congress may wish to authorize such a program and track the results to determine whether to expand it to all covered agencies. If Congress does so, the Conference would be interested in revisiting the 1995 proposal.

¹⁴ The obligations of the Sunshine Act present special challenges for agencies having three members, either from their structure or from vacancies, insofar as any substantive discussion amongst two members of the agency can trigger the Act.

¹⁵ Bull, *supra* note 7, at 17, 19–22.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ability to function effectively.¹⁶ At the same time, agencies can achieve greater transparency within the existing framework by apprising the public of their decisionmaking procedures and providing notice of business transacted outside of open meetings. In particular, agencies can exploit technological advances in order to disseminate information widely without incurring unreasonable costs.¹⁷ This recommendation highlights a number of best practices undertaken by agencies covered by the Act and encourages other agencies to consider these innovations and implement them as appropriate, while preserving agency discretion to tailor the proposals to fit the needs of their individual programs.

RECOMMENDATION

1. Each covered agency should develop and publicly release a succinct advisory document that discusses the mechanisms for attending and participating in open meetings and discloses the agency's procedures for closing meetings and the Sunshine Act exceptions upon which the agency typically relies. It should also describe the types of business the agency conducts outside of open meetings (including via notational voting) and how the results are revealed to the public. Each such agency should post a copy of this document on its website and in other places in which it can be accessed by interested members of the public.

2. For open meetings, agencies should post a meeting agenda as far in advance of the meeting as possible. Except for confidential information, deliberative materials that may be exempt from disclosure under the Freedom of Information Act, and information protected from disclosure under relevant agency policies, agencies should also post in advance all documents to be considered during the course of the meeting on the agency website. In the event that the

¹⁶ *Id.* at 19–20.

¹⁷ For example, the Department of Homeland Security has developed a webcasting forum, the Homeland Security Information Network, that allows agencies to webcast meetings and provides simultaneous captioning so as to ensure access for persons with hearing impairments. Bull, *supra* note 7, at 33–34. Agencies should explore the use of new technologies to provide ready access to meeting materials for individuals who otherwise might be geographically constrained from participating in the agencies' work.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

agency does not post non-exempt meeting documents in advance, it should do so not later than the start of the meeting or in a timely manner after the meeting has occurred.

3. Agencies should create email listservs, RSS feeds, or other electronic distribution mechanisms so as to provide timely notification for interested stakeholders and members of the public and an opportunity to receive meeting notices and other announcements relevant to upcoming meetings subject to the Sunshine Act.

4. Covered agencies should endeavor to post online the meeting minutes of transcripts for all public meetings for which meeting minutes or transcripts are prepared. Should verbatim transcripts be subject to unavoidable contractual limitations, they should be posted at the expiration of the contractual limitation.

5. Agencies should consider providing webcasts or audiocasts of open meetings. If practicable, agencies should consider providing real-time streaming video of ongoing meetings, but, if this does not prove viable, agencies should consider providing a webcast after the meeting has occurred that will be archived on the agency website for a reasonable period of time.

6. Consistent with relevant law and with agency policies concerning the protection of certain information (including, inter alia, confidential information and deliberative materials that may be exempt from disclosure under the Freedom of Information Act), agencies should provide a summary description of business disposed of in closed meetings or via notational voting. The description should provide a brief summary of ultimate conclusions that the agency reached (e.g., the results of votes taken via notation procedure) but need not describe individual statements made during such meetings or other predecisional elements of the preceding discussions.

7. Given the paucity of caselaw addressing the status of email exchanges under the Sunshine Act, members of covered agencies engaging in an intensive email exchange that ~~may~~ might be regarded as a virtual meeting might wish to stop short of seeking an agreement on

Comment [RTB1]: Jeff Lubbers' comment: Why would or should an agency enter into a contract with a private company to do a transcript that prevents the agency from putting it on its website? Doesn't section 11 of FACA require these to be put up on the website (because the cost of doing so would practically be zero)?



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

texts or subject matters under discussion. If the members actually intend to hold a “virtual meeting” via a series of electronic exchanges, they should consider using a web forum allowing members of the public to view the written exchanges.